Filed 12/27/18 P. v. Stone CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JORDAN ALI STONE, Defendant and Appellant.	G055107 (Super. Ct. No. 14NF3605) O P I N I O N

Appeal from an order and judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge. (Retired Judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant appeals from an order revoking his probation. We conclude the court's failure to ensure defendant received written notice of the charged violation deprived defendant of due process. Accordingly, we reverse.

FACTS

On November 19, 2014, defendant pleaded guilty to one count of human trafficking (Pen. Code, § 236.1, subd. (a)) and two counts of conspiring to pimp (§ 266h, subd. (a)). Appellant was sentenced to 9 years 4 months in state prison, but execution of the sentence was suspended in favor of three years of formal probation and 270 days in county jail. One of the terms of his probation was that he report to his probation officer within 72 hours of his release.

On January 29, 2015, defendant was released from custody on an "in-custody release"—he had a warrant for his arrest in another state and was directly extradited. As such, it was impossible for him to report to his probation officer within 72 hours per his probation condition.

Nevertheless, on February 23, 2015, a probation officer filed a one-page petition to revoke his probation, which made a single allegation: "According to the records of the Orange County Sheriff's Department, on January 29, 2015, the probationer was released from custody. Records indicate the release was an 'in-custody release' as the probationer was released on a fugitive warrant. Per the Orange County Jail, the probationer was released to another state and there was no way to determine which state the probationer was released to. As a result, the probationer's whereabouts are unknown." That same day, the court revoked defendant's probation and issued a warrant for his arrest.

On April 1, 2015, the Orange County probation officer made contact with defendant's probation officer in the state of Illinois and confirmed that defendant was in

custody there. The Orange County probation officer, however, did not dismiss or amend the petition in light of this information.

On November 18, 2015, defendant called his Orange County probation officer to report his whereabouts and contact information. Defendant stated he had been released from custody in Illinois in May 2015, but was still on parole there. He had apparently received a traffic ticket in Illinois, and that was the first time he was told of the warrant for his arrest here. When the probation officer asked where he had been, defendant responded that he thought everything, including probation, had been transferred to Illinois. (There is no indication defendant was represented by counsel at this time.) Defendant also reported that he was not allowed to leave Illinois under his parole conditions. Defendant subsequently faxed some sort of documentation to the Orange County probation officer, which, according to the probation officer, said nothing about restricting defendant from leaving Illinois, but the record is unclear as to what documentation that was. Moreover, defendant gave the probation officer contact information for his Illinois parole officer, but the probation officer never called to ask about travel restrictions.

The probation officer spoke with defendant again on December 1, 2015, and gave him two weeks to report to him in Orange County. Defendant did not report at that time.

Defendant's parole in Illinois ended on January 24, 2016. Once his parole ended, he hired an attorney in Orange County to try to resolve the probation revocation. (From evidence adduced after the hearing, we learn that the attorney was retained in February 2016 and appeared in chambers on March 1, 2016, in an attempt to resolve the situation. However, the court refused to recall the arrest warrant until defendant appeared in person.)

In April 2016, defendant submitted a pro se motion to reinstate probation and have it transferred to Illinois. His motion explained that he could not report to

probation prior to when the petition was filed because he was in custody. It further explained that, since being on parole, defendant had held down steady jobs and had sole custody of his 9-year old son. It further explained that he was a United States Navy veteran, having served for four years in Iraq during the Desert Storm war. Defendant's motion was marked received, but in May 2016 the court ruled that it would not consider the motion so long as defendant was in fugitive status.

In September 2016, defendant voluntarily turned himself in to authorities in Illinois in response to the warrant for his arrest in California, and Orange County flew him back here. A hearing on the probation revocation was held in October 2016.

At the beginning of the hearing, the prosecutor began asking the probation officer about contacts between him and defendant after February 23, 2015 (the date the petition was filed). Defense counsel objected on relevance grounds, arguing, "Your honor, the defense is relying on the petition to defend the case just like we rely on complaints or indictments and the petitions, and that specifically alleges a violation [before] February 23, 2015. [¶] So, the People are going to argue that there was a violation after that date. I am going to need more information as to the specificity. I don't think it is proper to have to defend every day after that date. [¶] This hearing should be restricted to the time period alleged in the probation violation allegation which is filed February 23, 2015, and it is alleging that there was no reporting after January 29, 2015. [¶] So, anything that happens after that is not allegedly violations in this petition and that is what I am here defending." The court overruled the objection. Shortly thereafter, defense counsel renewed her objection: "There is no allegation of failure to report after [January 29, 2015.] We already heard testimony that he was released to Illinois on a warrant and served some time there, was on parole there. [¶] So, anything beyond that date, there is nothing for me to defend. They are saying that they don't know where he is, but we know now that at some point they did find out where he is." "[I]t is not fair to say the defense has to litigate every day that passes after this warrant is issued

from February 2015 until today, because they are not alleging that. [¶] [They are j]ust alleging that, 'Hey, he got released from Orange County Jail. He went to some other state. We are going to issue a warrant.' [¶] Anything that happened beyond that is beyond the scope of this hearing." The court overruled the objection, stating, "I still don't understand your comments."

Defendant testified he was told he could not leave the state of Illinois while on parole there. Other than his alleged failure to report, defendant had no parole or probation violations either here or in Illinois.

At the conclusion of the hearing, the court found defendant had violated his probation after his parole ended in Illinois: "He needed to report after January [2016]. His failure to report, at that point, is a violation of probation." The court found this was a willful probation violation. The court then continued the sentencing hearing.

In the interim, defendant submitted various documents to support his request for reinstating probation. Those documents included a letter from the Department of Veterans Affairs (VA) confirming that defendant was honorably discharged from the Navy, having served in combat operations. It noted defendant is eligible for various services through the VA. It urged the court to release defendant in light of his strong motivation to improve his life, his care of his three children, and the absence of any danger to himself or society. The documents also included a certification from Joliet Junior College that he had recently completed a commercial driver's license course. Also included was a declaration from the attorney defendant had retained in February 2015 to initially attempt to clear up his probation violation. According to her, when she told defendant he would need to appear in California, he replied that he could not make the trip due to a lack of money, a lack of living arrangements in California, and a lack of child care in California. In an accompanying declaration, defendant explained that, after being told he would have to appear in California, he spent the following summer saving

money and figuring out who would take care of his son. In late August 2016, his brother agreed to care for his son, at which point he turned himself in to a local police station.

At the sentencing hearing, the court apparently offered defendant a prison term shorter than 9 years 4 months, although the record does not indicate what exactly it was. The court refused to listen to, in its words, defense counsel's "obvious eloquent reasons" why defendant should have been granted more leniency. The choice was either the court's offer or the full 9 years 4 month term. Defendant chose the full term, and the court sentenced defendant accordingly.[1]

DISCUSSION

A probationer is entitled to due process in the revocation of probation. The minimum due process requirements in this context are: "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489 (*Morrissey*); *People v. Vickers* (1972) 8 Cal.3d 451, 458 (*Vickers*) [*Morrissey* prescriptions for parole revocation proceedings equally applicable to probation revocation hearings].)

Under due process principles, a probationer is entitled to a two-stage hearing: first, "an inquiry . . . in the nature of a 'preliminary hearing' to determine

[1] It is unclear why defendant chose the full term. However, since we do not know the details of the court's alternative offer, we cannot speculate.

whether there is probable cause or reasonable ground to believe that the arrested [probationer] has committed acts that would constitute a violation of [probation] conditions." (*Morrissey*, *supra*, 408 U.S. at p. 485.) After a determination of probable cause is made, the second hearing goes beyond probable cause and must "lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." (*Id.* at p. 488.) Where a probationer absconds, his probation may be summarily revoked, provided the requirements in *Morrissey* are met after defendant is taken into custody. (*Vickers*, *supra*, 8 Cal.3d at p. 461.)

Here, the court violated defendant's due process rights in two respects. First, his probation was revoked without probable cause. Second, he was not given written notice of the alleged violation the court ultimately relied upon to uphold the revocation of defendant's probation.

The operative petition in this case—i.e., the written notice required by *Morrissey*—recited that defendant had been released from the Orange County Jail on an "in-custody release" to another state. "Per the Orange County Jail, the probationer was released to another state and there was no way to determine which state the probationer was released to." The only alleged violation in connection with this fact was that defendant's "whereabouts [were] unknown." This was apparently all the trial court had to go on when it initially revoked defendant's probation.

This did not amount to probable cause to revoke defendant's probation. It is obvious from the allegations of the petition that defendant had not absconded. He was in custody in another state. To the extent the probation officer could not determine defendant's location by asking the jail personnel, the fault plainly did not lie with defendant. The jailer's failure to have a record of the state to which defendant had been

transported cannot be the basis to charge a willful violation. "'[A] probation violation must be willful to justify revocation of probation.'" (*People v. Hartley* (2016) 248 Cal.App.4th 620, 634.) Defendant had not willfully failed to apprise his probation officer of his location. Anyone in defendant's position would assume the Orange County Sherriff's Office knew exactly where he was. Because the court did not have probable cause to revoke defendant's probation, doing so violated his due process rights.

The second violation of defendant's due process rights was in the failure to give defendant written notice of the violation the court ultimately relied on to uphold the probation revocation, or the evidence supporting that allegation. The petition was filed on February 23, 2015, and recited the allegations we summarized above. Defense counsel must have come to the hearing thinking this would be a fairly easy defense: his failure to report prior to February 23, 2015, was a result of defendant being in custody. It was not, therefore, willful, and was not, therefore, a basis to revoke probation. (*See People v. Galvan* (2007) 155 Cal.App.4th 978, 983 [abuse of discretion to revoke probation for failure to report where the defendant had been deported, preventing him from reporting].) At the hearing, however, the prosecutor shifted theories—now the alleged violation occurred almost a year later when defendant's parole in Illinois ended. We need not speculate that the prosecution's shift in theory took defense counsel by surprise. She said as much to the court. The purpose of requiring written notice of the alleged violation is to enable the defendant to prepare a defense. Defendant was not given that opportunity. In this respect, *People v. Self* (1991) 233 Cal.App.3d 414 (*Self*) is on point.

There, the defendant was on probation for writing checks with insufficient funds. The conditions of her probation included a reporting requirement, payment of restitution, and a prohibition on maintaining a checking account. (*Self, supra*, 233 Cal.App.3d at pp. 415-416.) A petition for revocation of her probation was filed, alleging she failed to report or pay restitution. (*Id.* at p. 416.) The trial court found those

allegations to be true, and also permitted the People to amend the petition to add an allegation that she had violated the prohibition on maintaining a checking account, which the court found to be true. (*Ibid.*)

The *Self* court held the trial court violated defendant's due process rights when it permitted the People to amend the petition at the hearing, and that this error required reversal: "As the People acknowledge, the probationer is entitled to written notice of the alleged violations of probation, disclosure of the evidence against the probationer and an opportunity to respond to the charges. [Citations.] Accordingly, the trial court erred in permitting the amendment without affording defendant the procedural safeguards required above. It is therefore unnecessary to address defendant's challenge to the sufficiency of the evidence for the court's finding that she violated the checking account prohibition." (*Self, supra*, 233 Cal.App.3d at p. 419.) It went on to find the court had abused its discretion in failing to consider the defendant's ability to pay restitution. (*Id.* at p. 417.) Regarding the failure to report, the court found that the trial court may have considered a more lenient sentence had that been the only violation, and thus it remanded for resentencing. (*Id.* at p. 419.)

Similarly, in *People v. Mosley* (1988) 198 Cal.App.3d 1167 (*Mosley*), the defendant was on probation for having committed rape. During his probation, he was charged with another rape, and the People filed a petition to revoke probation based on the new charge. The trial court held the probation revocation hearing in conjunction with the trial on the new charge. (*Id.* at pp. 1169-1170.) During the trial, it came out that the defendant had consumed alcohol—a separate violation of his probation. The People asked the court to consider that in addition to the new rape charge. (*Id.* at p. 1170.) The jury subsequently found defendant not guilty of the new rape charge. (*Ibid.*) Nevertheless, the court found defendant had violated his probation conditions by consuming alcohol. (*Id.* at pp. 1170-1171.)

The *Mosley* court found this violated defendant's due process right to written notice of the allegations against him. The court reasoned, "[The defendant] had no opportunity to prepare and defend against that allegation. Defense counsel might well have cross-examined the complaining witness and the officer with a different purpose had he known that he was defending his client against an allegation of alcohol consumption. Likewise, counsel may have called defendant as a witness. Because the trial court failed to provide 'a constitutionally sufficient safeguard of appellant's due process rights and [preserve] the fundamental fairness of the proceedings,' [the defendant] was denied due process." (*Mosley*, *supra*, 198 Cal.App.3d at p. 1174.)

The People attempt to distinguish *Self* and *Mosley* on the ground that, there, the variance between the written notice and adjudicated violation was a completely different charge: in *Self*, failure to appear or pay restitution versus maintaining a checking account; in *Mosley*, rape versus alcohol consumption. This argument misses the point of the written-notice requirement, however, which is to enable the defendant to prepare a defense against the charge. When the prosecution springs a wholly new allegation on the defendant at a revocation hearing, it makes little difference that it is the same *type* of allegation. What matters is that the defendant was not given an opportunity to defend against the new allegation. Neither the *Self* nor the *Mosley* courts placed any emphasis on the new allegations being of a different type—the point was that the violations themselves were not disclosed in the written notice.

The People further argue that any error in the written notice was harmless beyond a reasonable doubt because the "overwhelming" evidence at the hearing established that defendant failed to appear. Because defendant's constitutional right to due process was violated, we may only find the error harmless if we are persuaded beyond a reasonable doubt that it did not affect the outcome. (*Chapman v. State of California* (1967) 386 U.S. 18, 24.) We cannot so find. Defendant produced evidence in connection with the continued sentencing hearing that, had it been available at the

original hearing, may have supported a finding that defendant's violation was not willful, or that, even if it was willful, it did not warrant revoking probation. Moreover, there may be evidence available that was never presented due to defendant's inadequate opportunity to prepare. Defendant should be given that opportunity with all of the procedural safeguards he is entitled to.

DISPOSITION

The order revoking defendant's probation is reversed, and his sentence is vacated.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.